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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-708

THE NEWSPAPER GUILD, *Petitioner,*

v.

WICHITA EAGLE & BEACON PUBLISHING CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Newspaper Guild ("Guild") petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, *infra,* pp. 21-29) is reported at 480 F.2d 52. The Decision and Order of the National Labor Relations Board (A. 214-254, 259-60)[1] is reported at 199 N.L.R.B. No. 50 (1972). The Decision of the Labor Board in the underlying representation case (A. 178-183) is not reported.

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[1] "A" refers to the printed appendix in the Court of Appeals. A copy has been lodged with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1973. This Petitioner, The Newspaper Guild, was the charging party before the NLRB and the Court below granted its application for formal intervention on September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). By order dated September 21, 1973, Mr. Justice White extended the time for the filing of this petition to and including October 30, 1973.

QUESTIONS PRESENTED

1. Whether the Labor Board properly determined that editorial writers, whose drafts of editorials are subject to review and approval by the publisher, are employees covered by the National Labor Relations Act and are entitled to protection against discrimination for union activity.

2. Whether the Court of Appeals improperly ruled that editorial writers are so closely aligned with a newspaper's management in the formulation, determination and effectuation of management's policies, as to be excluded from the protection of the Act.

3. Whether the Court of Appeals improperly rejected the Board's test for "managerial employees" based on a conflict of interest in labor relation matters, and adopted a novel test which has the effect of denying the protection of the Act to a large number of employees.

4. Whether the Court of Appeals improperly injected into the case the specter of an infringement of the newspaper's First Amendment rights, in conflict with *Associated Press* v. *N.L.R.B.,* 301 U.S. 103 (1937).

5. Whether the Court of Appeals violated the teachings of *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951), by rejecting findings by the Labor Board, a Regional Director, and a hearing examiner that editorial

writers were not managerial employees excluded from the protection of the Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra,* pp. 30-32.

STATEMENT

The Representation Proceedings Before the Board

The Guild began organizational efforts among the employees of the employer, the Wichita Eagle & Beacon Publishing Company, in the spring of 1970, and in August, 1970, filed a petition for certification of representative in a unit which included editorial writers Dorothy Wood and Theodore Blankenship. (Pet. App. 22; A. 215-6.) A hearing on the petition was conducted during which the employer contended *inter alia* that editorial writers were "managerial employees" and their inclusion in the unit would infringe upon the employer's First Amendment rights. (A. 183-187.)

The Regional Director of the Board thereafter ordered a representation election to be conducted in a unit which included the two editorial writers. (A. 178.) He held that "[t]here is nothing in the evidence to indicate . . . that [editorial writers] in any way, possess indicia of managerial employees." (A. 181.) The employer's Request for Review to the Board repeated its defenses on the editorial writers. (A. 187-193.) This Request was denied. (A. 193.)

The Guild won the representation election and was certified. In March, 1971, contract negotiations commenced and, as of this date, no agreement has been reached. (A. 217; 34-36; Pet. App. 22.)

The Unfair Labor Practice Proceedings

During the Guild's organizational activities, Ms. Wood joined the Guild and acted as a union observer at the rep-

resentation election. (A. 229, 34, 36.) Later, she was elected to the union's executive committee and to the union's negotiating committee. (A. 230, 35.)

As an editorial writer, Ms. Wood researched and drafted editorials. The following facts were found by the hearing examiner. No editorial "was published without prior submission to, and clearance by," the editor and publisher, John H. Colburn. (A. 219.) Editorials written by Ms. Wood were "initially subject to Pearson's [editor of the editorial page and acknowledged supervisor] scrutiny, review, and clearance, and [Ms. Wood was] subject to his direction and supervision." (*Ibid.*) Again, "[a]n editorial prepared by Wood . . . must have the approval of Pearson and Colburn before it is published, with Colburn having the ultimate determination." (A. 220.) "[N]o editorial is approved or published without Colburn's and Pearson's clearance and approval." (A. 221.)

A conference among the editorial writers, Mr. Pearson and Mr. Colburn usually preceded the drafting of the editorials. (A. 221-2.) Drafts were subject to further discussion and modification or rejection. (A. 222.) When a writing assignment was given, which the writer did not wish to accept because it was unpalatable to the writer, a request to be excused would be "customarily" honored. (*Ibid.*)

It was further found as fact by the hearing examiner that Ms. Wood had "no management role nor any other role distinguishing [her] from other employees," in regard to the relationship between her employer and the employees respecting wages, hours, and working conditions. (A. 219.) In this regard, the hearing examiner stated:

> In addition to having no management role or participation in employer-employee relations, there is no evidence or contention that Wood or Blankenship were participants in or privy to basic ownership and man-

agement policies in the area of profit and loss, capitalization, stock issuance, stock distribution or ownership, acquisition or disposition of real or other property or expansion or contention of that enterprise, or related management policy. Management policy or views that were expressed in editorials were determined by Colburn, the editor and publisher, or perhaps, ultimately, by the owners of the newspapers. (A. 220.)

Ms. Wood specialized on certain topics for editorials:

> To complete the foregoing picture of Wood as an editorial page employee of Respondent since February 1965, the type of subjects on which she customarily drafted editorials and her outside activities are relevant. She focused on urban topics and frequently wrote about schools and their problems. Welfare and women's rights were also within her ken. Labor-management matters were not her topic. Indeed, according to Wood's uncontroverted testimony, labor-management was an infrequent topic on Respondent's editorial page. (Footnote omitted.) (A. 224.)

Shortly after Ms. Wood joined the Guild, Mr. Pearson warned her that "the consequences were likely to be real severe." (A. 229, 37.) Mr. Pearson said her employer "would not like" her Guild association, and said she "should be prepared by any consequences." (A. 229, 37.) After the Guild's victory in the representation election, Mr. Colburn refused to include Ms. Wood in the customary editorial-staff conferences, while continuing them with Mr. Pearson and Mr. Blankenship.[2] When Ms. Wood questioned this, she was informed that Mr. Colburn did not want her in the Guild and had terminated the conferences with her for this reason. (A. 231, 31.) Later, in January or February, 1971,

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[2] Mr. Blankenship had not joined the Guild, and he testified before the Board that he opposed the Guild and did not think it was proper for him to join. (A. 229.)

Mr. Colburn issued an order that Ms. Wood should not be permitted to write any editorials regarding labor affairs. (A. 231-2.) Ms. Wood complained to Mr. Pearson who agreed with her. Mr. Pearson told Mr. Colburn that he had confidence in Ms. Wood's competence and that as a "professional writer," she could write on these subjects and had never written anything "exploiting any prior activity that she was engaged in." (A. 232.) Mr. Colburn refused to relent.[3]

On August 16, 1971, Mr. Colburn transferred her from his editorial staff to the Sunday department of the paper. The ostensible reason was her involvement in a Women's Political Caucus.[4] (A. 239-240, 54-55.) The transfer became the basis for the unfair labor practice charge (A. 2.), and for the Complaint issued by the Board against the employer. (A. 5.)

After hearing, the Board held that where at least one of the reasons[5] for Ms. Wood's transfer was her Guild ac-

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[3] Before the Board, the employer cited an episode in May, 1971, concerning an editorial by Ms. Wood on a teachers' organization and school board dispute, as proof that Ms. Wood's Guild activities had affected her objectivity and her usefulness as an editorial writer. The Board did not credit this episode. The hearing examiner stated that, "In any event, we do not perceive in this episode of the school editorial, evidence of Wood's bias on labor matters or evidence of incompetence as a professional writer. More importantly, we have difficulty in believing that a person of Colburn's intelligence and experience in the newspaper field believed that, despite his failure to approve Wood's editorial, the proposed school editorial showed that Wood was incapable of writing professionally and without bias on labor matters." (A. 236.)

[4] The Board was later to characterize this reason as used by the employer "to color and diffuse the basic motivation against her union activities;" (A. 249.) and "pretextly added . . . so that the transfer might not appear to be based solely on her union activities." (A. 246.)

[5] Mr. Colburn candidly admitted that Ms. Wood's activity as a labor negotiator moved him to transfer her. He testified, "Q. And what was the outside activity? A. One was the outside activity dealing as a labor negotiator; two, coordinator of the Women's Caucus." (A. 242.)

tivity, the transfer was unlawful because it was motivated by discriminatory purposes in violation of the Act. (A. 242.)

The Court of Appeals' Decision

The employer petitioned the Tenth Circuit for review. It argued that

> The instant proceedings thus far may be accurately characterized as an inquisition by government into the editorial policies and content of a newspaper, coupled with interrogation as to the political beliefs and affiliation of petitioner's management and editorial staff. The process should not be countenanced. (Employer Brief 40.)

It defended against the Board's Order by claiming that the Board had no jurisdiction over persons who participate in the "formulation and expression of newspaper editorial policy;"[6] that the Board's exercise of jurisdiction over it violated rights protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution; and that the Board's Order lacked the support of the requisite "substantial evidence on the record considered as a whole."[7] The Employer characterized the Board's proceeding as an "inquisition"

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[6] In connection with this argument, the Employer made allusion to Ms. Wood as "intimately identified with management," as one "physically placed in the closest proximity to the chief executive officer," and serving "as the voice of management." Employer Br. 30. The employer also argued that *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1937), was distinguishable, as applied to one who writes editorials. However, no where in its brief did the Employer state flatly that Ms. Wood was a "managerial employee" to be exempted from the Act's protection.

[7] Yet, the employer had conceded that the Board credited certain testimony favorable to Ms. Wood, and chose not to credit other testimony offered by the employer. The thrust of the employer's disagreement with the Board on this point was its assertion that Ms. Wood's transfer "was actually occasioned by unimpeachable reasons," namely, "because of her flagrant violation of company policies . . ." (Employer Brief 18, 19.)

(Employer Brief 35.), and made the startling suggestion that, "If a newspaper's management is not absolutely privileged under the First Amendment to control its editorial assignments, then the similarity between the American press and Pravda and Tass is apparent." (Employer Brief 17.)

The Employer's Constitutional arguments had their intended effect: The Court of Appeals avoided meeting these arguments head-on, and made its decision turn on the issue of Ms. Wood's status as a "managerial employee." The Court stated that if her status were determined to be otherwise, then the Board's Order would come "perilously close" to an infringement of the employer's First Amendment guarantee of freedom of the press. (Pet. App. 28) The Court held,

> We therefore reject the Board's determination that the two editorial writers, Ms. Wood and Mr. Blankenship, were "employees" under the National Labor Relations Act. Rather, we hold that they were so closely aligned with the newspaper's management in the formulation, determination, and effectuation, not to mention expression, of the newspaper management's policies through its editorials as to be properly excluded from the collective bargaining unit of news department employees. (Pet. App. 28.)

It concluded,

> On the facts here present we find that the Board's Decision and Order are not supported by "substantial evidence on the record considered as a whole." (Pet. App. 29.)

REASONS FOR GRANTING THE WRIT

I. Certiorari Has Been Granted in *Bell Aerospace*, Involving The Same Issue Presented in This Case.

On October 9, 1973, this Court granted the NLRB's Petition for a Writ of Certiorari in *NLRB* v. *Bell Aerospace*

Co., 42 U.S.L. Week 3194 (No. 72-1598). The questions before the Court in that case, as stated in the Petition, are:

> 1. Whether the Board properly determined that "managerial employees" are covered by the National Labor Relations Act unless their duties are such that it is likely that there would be a conflict of interest between their job responsibilities and their responsibilities to a labor organization.
>
> 2. Whether the court of appeals improperly required the Board to conduct rule-making rather than adjudicatory proceedings to determine whether certain employees are "managerial employees."

The first of these questions is squarely presented in the instant case as well. Moreover, this Court's ruling on either of the questions in *Bell Aerospace* will directly affect the disposition of this case. Because *Bell Aerospace* raises the question of the proper "managerial employee" test to be applied to buyers, and this case raises the same question as it relates to editorial writers, the Court's consideration of both cases in tandem will place the question in a broader factual perspective, and thus aid the Court in visualizing the full scope of the issue before it.

II. The Decision Below Conflicts With The Decision in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1937).

In *Associated Press,* the Court addressed a claim by the AP wire service that the application of the Act to the news service unconstitutionally impaired its freedom of the press. The employer had fired one Watson, an "editorial" employee in the news department. Mr. Watson's assignments were "to receive, rewrite and file for transmission news coming into the office." 301 U.S. at 127. To do so he had

> . . . to determine the news value of items received and speedily and accurately to rewrite the copy delivered to them, so that the rewritten matter shall be

> delivered to the various filing editors who are responsible for its transmission, if appropriate, to the areas reached by their circuit. *(Ibid.)*

The American Newspaper Guild, the instant petitioner, filed a charge with the Board claiming the discharge was unlawful under the Act. The Board agreed, and ordered Mr. Watson reinstated. On certiorari to the Supreme Court, AP argued:

> It is insisted that the Associated Press is in substance the press itself, that the membership consists solely of persons who own and operate newspapers, that the news is gathered solely for publication in the newspapers of members. Stress is laid upon the facts that this membership consists of persons of every conceivable political, economic, and religious view, that the one thing upon which the members are united is that the Associated Press shall be wholly free from partisan activity or the expression of opinions, that it shall limit its function to reporting events without bias in order that the citizens of our country, if given the facts, may be able to form their own opinions respecting them. The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press. 301 U.S. at 130-1.

These arguments were all rejected by the Supreme Court:

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.
>
> * * * * *
>
> The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt. 301 U.S. at 132-3.

In the present case, the employer has renewed the arguments of AP of 1937. The claim now, as then, is that enforcement of the Act's prohibition against discriminatory activities in the newspaper industry abridges the employer's fair and unbiased publication of the news. What is missed by the employer, and ignored by the Tenth Circuit, is the obvious: The Act does not compel the continued employment of anyone or that the employer "retain . . . an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice," 301 U.S. at 132; the employer "is free at any time to discharge . . . any editorial employee who fails to comply with the policies it may adopt." 301 U.S. at 133.

The Court of Appeals steered to avoid a collision course with *Associated Press,* by suggesting that Mr. Watson, as an "editorial" employee, is different from Ms. Wood, as an "editorial writer." (Pet. App. 26-7.) Petitioner believes this is a distinction without a difference.

The evil of the obdurant union adherent, as conjured up by the publisher, sitting in on the private meetings of the employer to determine what the reader will read in the newspaper, is the same whether the person is in the news department of AP or is in the editorial offices of the *Wichita Eagle & Beacon*. Indeed, a good argument can be made that the evil is greater where it is only the "news" that is being discussed, rather than an "editorial." For when the "news" is slanted to express opinion, the reader is usually unaware. The same is not so for the reader of the editorial page: he knows, or has reason to know, that the views expressed there are pure opinion.

Be this as it may, in *Associated Press* the Court held the publisher's fears to be unfounded: "The regulation [prohibiting discharge for union activities] . . . has no relation whatever to the impartial distribution of news." 301 U.S. at 133.

To reach the conclusion that Ms. Wood was different from Mr. Watson, the Court of Appeals had to make finding outside the record and beyond anything determined by the Board. The Court held that Ms. Wood "was intimately involved in 'formulating, determining and effectuating' her employer's policies." (Pet. App. 27.) There is nothing in the evidence to support this relationship of intimate involvement, or of Ms. Wood setting the newspaper's editorial position on any subject. Indeed, the Board held the opposite: that she only drafted editorials; that her work was closely scrutinized and supervised; and that nothing was published unless and until it was approved by Mr. Pearson and Mr. Colburn. This hardly makes Ms. Wood "a member of the Chief's council," as the Court below would have it.

Assuming *arguendo* the legitimacy of the distinction drawn by the Court between reporting of news and the "creation and expression of subjective opinion," the record

simply does not warrant a finding that Ms. Wood either "created" or "expressed" opinion for the employer. Whatever she drafted was subject to prompt "editing out," and management exercised this right on occasion. (A. 219-221, 233. Furthermore, her employer retained the same power to control her employment and to enforce non-discriminatory employment policies against her as were retained in *Associated Press.* The Board's decision to include her under the Act gave her no license to rove, any more than it fettered her employer in its rights to discipline her, to instruct her or to assign her topics for drafting editorials.

The decision of the Tenth Circuit does render the newspaper immune from accountability for anti-union activities against editorial writers. This quest for immunity, in the name of freedom of the press, was denied in *Associated Press,* and has been commonly denied since then when importuning news media seek some special shelter.

Most recently, in *Pittsburgh Press Co.* v. *The Pittsburgh Commission Human Relations,*—U.S.—, 37 L.Ed 2d 669 (1973), the Supreme Court upheld the constitutionality of a local ordinance forbidding newspapers to carry help-wanted advertisements in sex-designated columns, against the newspaper's contention that the ordinance violated the First Amendment by restricting its editorial judgment. Because of the highest rank accorded freedom of speech and of the press, the Court took special care to determine whether the ordinance fell within one of the few exceptions "to the principle that the press may not be regulated by the Government." 37 L.Ed 2d at 675. It held that it did. And it pointedly reiterated that there is extensive regulatory legislation from which " '[t]he publisher of a newspaper has no special immunity,' " citing *Associated Press. (Ibid.)* The Court went on to cite other legislation which has been held applicable to the press, notwithstanding First Amendment claims: the Fair Labor Standards Act—*Mabee* v. *White*

Plains Publishing Co., 327 U.S. 178 (1946); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (1946); and the Sherman Anti-Trust Act—*Associated Press* v. *U.S.* 326 U.S. 1 (1945); *Citizen Publishing Co.* v. *U.S.* 394 U.S. 131 (1969). *(Ibid.)*

Mr. Justice Powell in *Pittsburgh Press* observed cogently that when the press seeks a shelter, it must be closely asked, from what? The Justice noted that discrimination in employment is illegal, and the restrictions in the ordinance were "incidental to a valid limitation on economic activity." 37 L.Ed 2d at 678-9.

The same may be said herein. Discrimination in employment for union activities is illegal. The publisher here is asking for, and the Tenth Circuit granted it, immunity from the consequences of having committed an illegal act against Ms. Wood. *Associated Press* forbids this result.

III. The Supreme Court Should Resolve The Conflict Between The Board And Among The Several Courts Of Appeals On The Proper Test For "Managerial Employees."

The test applied by the Board for "managerial employees" is stated in *Bell Aerospace Co.,* 196 N.L.R.B. No. 127, 80 L.R.R.M. 1099 (1972):

> It is clear enough, as the legislative commentary and commentary in several of our own decisions has explained, that there is sound basis for the exclusion of those concerned with management policies in the labor relations area. There, the potential for conflict of interest is apparent and thus an orderly administration of this Act requires the exclusion of such personnel from coverage.
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> * * * * *
>
> But throughout any attempted analysis must run the common thread of an examination as to whether the

> duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization. That is the fundamental touchstone. 80 L.R.R.M. at 1101.

This is a reaffirmation of the test formulated by the Board in *North Arkansas Electric Coop.,* 185 N.L.R.B. 550 (1970), wherein the Board stated,

> We do not in this initial consideration wish to attempt an inflexible comprehensive definition, for we are of the view that a definition must be evolved on a case-to-case basis. However, it is relevant, we believe, to focus our attention upon whether the employee here had either real or apparent authority to speak as an 'employer' in a labor relations or employee relations context. 185 N.L.R.B. at 550-51.

The emphasis in the Board's test is whether any "conflict of interest" could arise if the person "was a participating member of a labor organization." 80 L.R.R.M. at 1101. Because this conflict is or would be usually suggested in the context of persons involved in employee relation matters, the focus of the test is directed to whether the person participated in the "formulation, determination, or effectuation of policy with *respect to employee relations matters.*" 185 N.L.R.B. at 551 (Emphasis in original).

When the Board, in *North Arkansas,* promulgated its test, it was responding to adverse comment against its prior tests and their application. The Board wrily commented,

> Our lack of clear definition has evoked some judicial criticism. Thus, one court has commented that the Board 'has not developed clear guidelines for determining whether particular individuals are "managerial

employees,"[4] and another has announced that there was no stated Board rationale for finding the procurement drivers in Swift[5] and the credit managers in Diana Shop[6] to be managerial.[7]

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[4] *Illinois State Journal-Register, Inc.* v. *N.L.R.B.*, 412 F.2d 37 at 41, 71 LRRM 2688. (C.A. 7, 1969.)

[5] Swift & Company, 115 NLRB 752, 37 LRRM 1391.

[6] Diana Shop, 118 NLRB 743, 40 LRRM 1256.

[7] *Retail Clerks International Association, Local 880* v. *N.L.R.B.*, 366 F.2d 642, 645, 62 LRRM 2837, C.A.D.C., 1966.

185 N.L.R.B. at 550 (footnotes in original).

The Eighth Circuit rejected the Board's test, on petition for review in *North Arkansas.* See *North Arkansas Electric Coop.* v. *N.L.R.B.*, 446 F.2d 602 (1971). That Court held that the Board's test "improperly limits the class of employee not protected by the Act," (446 F.2d at 610), with the addition of the phrase "with respect to employee relations matters." The Court held that the proper test is whether the persons are "so closely aligned with management as to be excluded from the bargaining unit and who had not been held to be 'employees' by the Board prior to the 1947 amendments." *(Ibid.)* Thus, the Eighth Circuit would exclude from the Act anyone who formulates, determines and effectuates the employer's policies, of whatever kind or character.[8]

The Eighth Circuit cited and quoted with approval decisions from two other Circuits on the proper test for managerial employees. In the first, *Illinois State Journal-Register, Inc.* v. *N.L.R.B.*, 412 F.2d 37 (1969), the Seventh Circuit stated that it was following the conclusion of the

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[8] No petition for writ of certiorari was filed in *North Arkansas.* The Board has declined to follow the decision of the Court of Appeals therein. See *Bell Aerospace Co.*, 196 N.L.R.B. No. 127, 80 LRRM 1099, 1100-1 (1972).

District of Columbia Circuit in *Retail Clerks International Union* v. *N.L.R.B.,* 366 F.2d 642 (1966), *cert. denied,* 386 U.S. 1017 (1967), that the Board was using two tests for managerial employees. One test, or the "alignment test," is "essentially a narrow one in the sense that unless an employee *is substantially involved in his employer's labor policies* his relationship with management is not one of a managerial employee." 412 F.2d at 41 (Emphasis added.) The other test is whether the person is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy. (*Ibid.*)

The Court of Appeals for the Second Circuit was presented with this same, confusing pattern on petition for review in *Bell Aerospace.* See *Bell Aerospace Co.* v. *N.L.R.B.,* —F.2d—, 82 L.R.R.M. 2753, *cert. granted,* 42 U.S.L. Week 3194 (Oct. 9, 1973) (No. 72-1598). Judge Friendly was unable to unwind the strands of the knot, and he ordered that before the Board could fashion a "new" test, it had to conduct a formal rule-making proceeding under the Administrative Procedure Act. 82 L.R.R.M. at 2760-63.

The decision of the Tenth Circuit herein makes no refernce to *Bell Aerospace.* The Tenth Circuit rejected, *sub silentio,* the Board's test in *North Arkansas,* by acknowledging that Ms. Wood was in nowise placed in a conflict of interest situation regarding employee relations matters. (Pet. App. 27.) It held that Ms. Wood was "intimately involved in 'formulating, determining and effectuating' her employer's policies, citing with apparent approval *Illinois State Journal-Register* and *Retail Clerks.* (Pet. App. 27.) Unmentioned is the thorough and penetrating analysis in *Illinois State Journal-Register* of the "second" test, and that Court's conclusion that an employee's power *to recommend policy* does not rise to the level of the discretion and authority necessary to make that employee a part of management.

412 F.2d at 42-3. The Court below thus evaded having to explain away the Board's findings that Ms. Wood could write or publish nothing without the expressed approval of management, and that she only recommended or suggested topics for editorials and the publisher's position thereon.

Also unmentioned by the Court below in citing *Retail Clerks,* is the District of Columbia Circuit's holding that in applying the "second" test even if it is assumed the person has discretion, that "discretion is not the touchstone if it must conform to the employer's established policy." 366 F.2d at 645. In that connection it must again be emphasized that Ms. Wood had to conform to Mr. Colburn's established editorial policies, and if she did not, her draft of an editorial was discarded.

Since editorial writers, like Ms. Wood, could not be excluded from coverage under existing standards, the only reasonable conclusion to be drawn from the Tenth Circuit treatment of the managerial-employee test is that it forged another and different one from any of the others. We urge that, for the necessary guidance of all parties covered by the Act, this Court step in to resolve these conflicts.

IV. The Decision of The Court of Appeals That Editorial Writers Are So Closely Aligned with Management That They Are Not "Employees" Under The Act Is Clearly Erroneous, and Raises Important Questions of The Administration and Coverage of The Act.

Since the decision of the Board in *A.S. Abell Co.,* 81 N.L.R.B. 82 (1949), editorial page employees and editorial writers commonly and uniformly have been held to be "employees" under the Act and entitled to the protection thereof.[9] The decision below is the first appellate ruling which excludes editorial writers from the coverage of the Act.

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[9] See also *Worchester Telegram Publishing Co.,* 61 N.L.R.B. 1118 (1945).

The Guild, as the predominant union of and for newspaper reporters and writers, has consistently organized and bargained for units of employees on the premise that editorial writers are covered by the Act. Appendix C to this Petition sets forth the relevant data on this bargaining history, with a complete listing of the daily newspapers affected. Of the 124 agreements between the Guild and newspapers throughout the country, only 10 exclude persons like Ms. Wood. Ninety-two percent of these agreements include editorial writers, explicitly or implicitly. (Pet. App. 33-40.)

Accordingly, the impact of the decision below upon the Guild and collective bargaining patterns in the newspaper industry is enormous. The more so, because the decision flies in the face of the facts and the day-to-day working relationships, which the Board clearly understood and credited in favor of Ms. Wood. The Court of Appeals, *per contra,* disregarded entirely these findings by the Board, which were amply supported by record testimony, and obtusely concluded that the Board's decision was not supported by "substantial evidence."[10] A fair characterization of the Court's decision is that it held, as a matter of law, editorial writers are excluded from the Act.

This judgment, of coverage under the Act *vel non,* is one entrusted to Congress in the first instance, and to the Board in the exercise of its administrative role. The Court of Appeals identifies no section or provision of the Act wherein it can be said, even arguably, that Congress excluded editorial writers as managerial or confidential employees from the Act's protections.[11] The Board was clear-

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[10] In so ruling, the Court of Appeals paid no heed whatever to the admonitions of this Court in *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951), and thereby usurped the primary jurisdiction of the Labor Board.

[11] The Court declined to attach a label to Ms. Wood. It stated, "Whether termed a managerial employee, a confidential employee, or whatever . . ." (Pet. App. 27.)

ly correct in its construction of the Act to include Ms. Wood, and the Tenth Circuit was patently wrong to deny her the Act's protection.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 30, 1973

Filed July 2, 1973

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 72-1673

WICHITA EAGLE & BEACON PUBLISHING CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of an Order of National Labor Relations Board

---

Gerrit H. Wormhoudt, Wichita, Kansas (Paul R. Kitch and J. Eric Engstrom, Wichita, Kansas, with him on the Brief), for Petitioner.

Corinna Lothar Metcalf, Attorney, National Labor Relations Board (Peter G. Nash, General Counsel, Patrick Hardin, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Leonard M. Wagman, Attorney, National Labor Relations Board, with her on the Brief), for Respondent.

Before PHILLIPS, SETH and HOLLOWAY, Circuit Judges.

SETH, Circuit Judge.

Wichita Eagle & Beacon Publishing Co., Inc. petitions this court, pursuant to 29 U.S.C. § 160(f), to review and

set aside an order of the National Labor Relations Board (199 NLRB No. 50). The Board cross-petitions for enforcement of its order.

The Board has found that the newspaper had engaged in unfair labor practices within the meaning of sections 8(a) (1) and (3) of the Act, by transferring employee Dorothy Wood, against her will, from the editorial page department to the Sunday magazine department because of the said Wood's union activities, and by telling employee Wood that consequences of her union membership and activity might be severe.

The record shows that the newspaper is engaged in the publishing, sale, and distribution of daily newspapers in Wichita, Kansas. In August 1970, the Wichita Newspaper Guild, affiliated with The Newspaper Guild, AFL-CIO, filed a petition with the Board seeking certification as the collective bargaining agent of the newspaper's employees. The Board conducted a hearing on the petition and issued a Decision and Direction of Election. In connection therewith, the Board found that two "editorial writers," Dorothy Wood and Theodore Blankenship, should be included in the bargaining unit as they did not "possess indicia of managerial employees."

The newspaper filed a request for review of the Decision and Direction of Election with the Board, limited to the inclusion of the two editorial employees in the bargaining unit, but the Board denied the request for review.

An election was conducted by the Board among the unit that it had determined was appropriate and the Union was certified as the collective bargaining agent for the bargaining unit. Contract negotiations between the newspaper and the Union were begun, and at the time of the hearing of the unfair labor practice complaint the parties had not reached a contract.

As to Mrs. Wood, the Union filed charges and a hearing was held before a trial examiner. The trial examiner found that the newspaper had violated sections 8(a)(1) and (3) of the Act by transferring Mrs. Wood from the editorial page department to the Sunday magazine department because of her union activities. He recommended that she be reinstated in the editorial page department and that she be awarded any back pay that she would have been entitled to, including increases in salary, but for her transfer. The newspaper filed exceptions to the trial examiner's Decision. The Board issued its Decision and Order, adopting the trial examiner's Decision and adopting his recommended Order.

Mrs. Wood's position prior to her transfer to the Sunday magazine department was that of an editorial writer. As the trial examiner's Decision states, the editorial page department of the newspaper consisted of three people. Charles Pearson, editor of the editorial page, was the acknowledged supervisor of the two employees in the editorial page department, Mrs. Wood and Mr. Blankenship. He was excluded from the collective bargaining unit at the representation hearing by the Board. In the words of the trial examiner, John H. Colburn, editor and publisher of the newspaper, was also part of the editorial page department "in a real but perhaps ex officio sense." The trial examiner's Decision includes this description of the relationship of the positions:

> "Normal day to day procedure, in the editorial page department, was the holding of a mid-morning conference, with Colburn, Pearson, Wood and Blankenship participating. In turn, at the conference, Pearson, Wood, and Blankenship would be asked what he or she had in mind for an editorial. Wood, for instance, when thus asked, might say that she had in mind writing a piece on ecology. Colburn or Pearson might say that we had an editorial on air and water pollution

last week so we will not go on ecology again at this time. That would dispose of Wood's proposal. Or, for instance, Colburn might have responded to Wood's proposal in the following vein: What particular aspect of ecology do you have in mind; Wood would respond, with some details and elaboration; the matter would then be discussed by those present; Colburn might then say to Wood, all right, give it a try. On some other subject thus raised, Colburn might make it clear that there were certain specific things that he wished to be stated in the particular proposed editorial, e.g., the theme of the editorial should be that, on balance, after weighing the arguments pro and con, the Government should proceed with the development of the supersonic transport plane because of the need to maintian leadership in the field of air transportation and because of the need to maintain a viable aerospace industry and the tens of thousands of jobs involved in that and in satellite industries. The editorial writer would follow such a directive.

"Following the foregoing type of daily conference with Colburn, Pearson, Wood, and Blankenship would return to their offices. They would then get together in Pearson's office and discuss at greater length topics that had received tentative approval at the conference with Colburn. Views and possibly conflicting contentions would be exchanged and argued. In most instances it would be at this tripartite conference that definite editorial topics would be assigned by Pearson, to Wood, Blankenship or himself.

"After a writer drafted or wrote an editorial, it was then submitted to Pearson. He might approve it, disapprove it, or prescribe changes or revision. If the editorial cleared Pearson, it would then go to Colburn. Again, the editorial might be approved, rejected, or re-

jected subject to some particular revision being made." Trial Examiner's Decision, Findings and Conclusions.

Whenever a particular member of the editorial department was assigned a topic which he or she felt unable to write upon, either for reasons of personal conviction or otherwise, upon request the writer would be excused from the assignment. However, as the trial examiner found, " . . . every witness in this case, including Wood, agrees that the editorials of the newspaper function as the voice of [the newspaper's] ownership and management. What appears in an editorial is the subjective viewpoint of management." Trial Examiner's Decision, Findings and Conclusions.

Petitioner newspaper contends that editorial writers have the essential characteristics of managerial and confidential employees and therefore the two editorial writers in question, Mrs. Wood and Mr. Blankenship, were improperly included in the collective bargaining unit to begin with, and the newspaper's action in transferring Mrs. Wood was not properly subject to the Act's coverage. On the particular facts of this case, as brought out in the trial examiner's Decision and from an extensive reading of the record, we agree.

We recognize that the task of determining the application of the term "employee" ". . . has been assigned primarily to the agency created by Congress to administer the Act." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111; *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157. The courts, however, ". . . have never immunized Board judgments from judicial review in this respect." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.* The court said in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324 (8th Cir.):

"The term 'managerial employee' is not used in the National Labor Relations Act, nor is provision made in

> the Act for the inclusion or exclusion of such employees in bargaining units. The Act is silent as to whether this type of employee is entitled to the protection of the Act for union activities or membership. The Board, however, has long followed the practice of excluding employees, designated as 'managerial,' from bargaining units in representation elections. It does so on the premise that certain non-supervisory employees are so closely allied with management that they should be excluded from employee bargaining units."

Although the Board considers editorial writers such as Mrs. Wood to be employees within the meaning of the Act, A. S. Abell Co., 81 NLRB 82, 83 (1949), and there does seem to be some language in the case of *Associated Press* v. *NLRB,* 301 U.S. 103, which could support this position, a closer reading of the latter case in view of its facts leads us to another conclusion.

Associated Press dealt not with a person who was actively engaged in the "formulating, determining and effectuating" of the employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB,* 412 F.2d 37 (7th Cir.); *Retail Clerks International Ass'n, AFL-CIO* v. *NLRB,* 366 F.2d 642 (D.C. Cir.). Rather, that case dealt with a person who, although characterized as an "editor" or "editorial employee," was employed ". . . to determine the news value of items received and speedily and accurately to rewrite the copy delivered to [him], so that the rewritten matter [should] be delivered to the various filing editors . . . responsible for its transmission, if appropriate, to the areas reached by their circuits."

Regardless of which appellation is given to the employee in Associated Press, whether it be "editor," "editorial employee," or a member of the "news department," his position was much more akin to that of the employees in the news department of the petitioning Wichita Eagle & Beacon Publishing Co., Inc., in the instant case than to that of Mrs.

Wood. The hierarchy of personnel in Associated Press was such that the aggrieved employee was responsible, in turn, to a filing editor, various "editorial employees," "supervising editors," and an "executive news editor" in the "news department" of the Associated Press.

Although Mrs. Wood was responsible to the editorial page editor, Mr. Pearson, and in turn to the editor and publisher of the newspaper, Mr. Colburn, as concerns the content and direction of the newspaper's editorials, she nevertheless was an active participant in "formulating, determining and effectuating" the newspaper's journalistic policies. The daily conferences between Colburn, Pearson, Wood, and Blankenship attest to this relationship. While subject to supervision in her writing by the editorial page editor and the editor and publisher, Mrs. Wood could, and did, propose topics for editorials, propound her own viewpoint in an effort to influence editorial policy on various subjects, and was, in sum, an integral participant in the newspaper's subjective voice, its editorials. Whether termed a managerial employee, a confidential employee, or whatever, Mrs. Wood's relationship to the newspaper and its staff placed her in a position where she was intimately involved in "formulating, determining and effectuating" her employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB,* 412 F.2d 37 (7th Cir.); *Westinghouse Electric Corp.* v. *NLRB,* 398 F.2d 669 (6th Cir.); *Retail Clerks International Ass'n, AFL-CIO* v. *NLRB,* 366 F.2d 642 (D.C. Cir.).

Mrs. Wood may not have been a "Chief" (in the words of the trial examiner), but she was certainly a member of the Chief's council in the formulation of editorials. We recognize that she had no formal hand in determining wages, hours, and working conditions for employees on the newspaper, nor did she participate in such matters as basic ownership and management policies in the area of profit

and loss and the like. Cf. North Arkansas Electric Cooperative, Inc., 185 NLRB No. 83 (1970), 75 LRRM 1068-69. There is, however, a distinction between the reporting of news and the creation and expression of subjective opinion on behalf of a newspaper. To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper's management would come perilously close to infringing upon the newspaper's First Amendment guarantee of freedom of the press.

The business of the newspaper is not immune from the Act's coverage merely because it is an agency of the press. *Associated Press* v. *NLRB*. The newspaper is not contesting the Board's determination that its news department employees are a proper collective bargaining unit and come within the Act's protections. Although the Board's ruling in this case does not have any relation to the impartial distribution of news, per se, nor to the newspaper's ability and freedom to publish the news as it desires it published (*Associated Press* v. *NLRB*), it does infringe upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas.

We therefore reject the Board's determination that the two editorial writers, Mrs. Wood and Mr. Blankenship, were "employees" under the National Labor Relations Act. Rather, we hold that they were so closely aligned with the newspaper's management in the formulation, determination, and effectuation, nc' to mention expression, of the newspaper management's policies through its editorials as to be properly excluded from the collective bargaining unit of news department employees.

As the Supreme Court has noted:

". . . [I]n the normal course of events Board orders in certification proceedings under § 9 (c) are not di-

> rectly reviewable in the courts. This Court held as long ago as *American Federation of Labor* v. *Labor Board,* 308 U.S. 401, that the 'final order[s]' made reviewable by §§ 10 (e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain. . . . In such a case, § 9 (d) of the Act makes full provision for judicial review of the underlying certification order by providing that 'such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed' in the Court of Appeals." *Boire* v. *Greyhound Corp.,* 376 U.S. 473.

See also *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137. This is the situation in this case. The newspaper has duly filed objections to and requests for review of the collective bargaining unit determination at every step in this controversy. On the facts here present we find that the Board's Decision and Order are not supported by "substantial evidence on the record considered as a whole." National Labor Relations Act, § 10(e), 29 U.S.C. § 160(e). Accordingly, the petition for review is granted, and the Decision and Order of the National Labor Relations Board, filed September 29, 1972, is vacated.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, et seq.) are as follows:

* * *

Section 1

The inequality of bargaining power between employees who do not possess full freedom of association of actual liberty of contract, and employers who are organized in the corporate of other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * *

Section 2(3)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, *** or any individual employed as a supervisor, *** or by any other person who is not an employer as herein defined.

Section 2(8)

The term "unfair labor practice" means any unfair labor practice listed in section 8.

Section 8(a)(1)

It shall be unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Section 9(b)

The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(c) Whenever a petition shall have filed, in accordance with such regulations as may be prescribed by the Board—the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Section 10(f)

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may ob-

tain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business *** [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX C

EDITORIAL WRITERS INCLUDED

(Specifically included)

CONTRACT	LANGUAGE
Baltimore Sun & Evening Sun	Editorial writers covered Art. V minimum salaries
Battle Creek Enquirer & News	Editorial writers covered Art. III minimum salaries
Buffalo Courier-Express	Chief editorial writer exempt. Editorial writers covered Art. V minimum salaries
Buffalo Evening News	Editorial page editor exempt. Editorial writers covered minimum wages
Canton Repository	Editorial writers covered Art. 14 minimum salaries
Cincinnati Ky. Post & Times Star	Editorial employees: All employees charged with gathering, writing and editing of news and feature materials of all kinds; editorial writers, columnists, Page 21 appendix A. salaries
Cleveland Plain Dealer	Editorial writers covered Art. III minimum salaries
Cleveland Press	Editorial writers covered Art. III minimum salaries
Denver Post	Editor, Editorial page exempt. Editorial writers covered Art. XVIII wages
Detroit Free Press	Editorial writer covered Art. IV wages schedule B
Elizabeth Daily Journal	Editorial writers covered Art. V salaries
Erie News & Times	Editorial writers covered Art. V minimum salaries

CONTRACT	LANGUAGE
Fall River Herald-News	Editorial writers covered salary schedule
Jersey City Journal	Editorial writers covered but *exempt under Art. VI hours*
Manchester Union Leader	Editorial writers covered Art. II salaries
New York Times	Editorial writers covered Art. III Sec. 1, Group O salaries
Oakland Tribune	Chief editorial writer covered but *exempt Art. XI hours & overtime*
Phila. Inquirer & News	Editorial writers covered
Pittsburgh Post-Gazette	Editor of the editorial page exempt. Editorial writers covered Art. III wages
Pontiac Oakland Press	Editorial writers covered Art. XV wages
Portland Press Herald Express & Tele.	Editorial writers covered Art. V wages
Providence Jrnl Bulletin	Chief editorial writer exempt. Editorial writer covered Art. XVIII wages
Rochester Democrat	Editorial writers covered Art. IV wages
Royal Oak Tribune	Editorial writers covered Art. XV wage scale
St. Louis Globe-Democrat	Editor of Editorial page exempt. Editorial-writing employees covered Art. II wages
St. Paul Dispatch & Pioneer Press	Editorial & political writers covered Sec. 65-A. Editorial wage
San Antonio Light	Editorial writers covered Art. XVIII minimum salaries
San Francisco (Citywide)	Editorial writers covered but *exempt from Art. XI hours & overtime*

CONTRACT	LANGUAGE
San Juan El Mundo	Editorial writer covered Art. XVIII wages
Scranton Tribune	Editorial writer covered Art. III wages
Seattle Times	Editorial writers covered Art. VI minimum salaries
Stockton Record	Editorial writers covered Art. IV minimum salaries
Toledo Blade & Times	Editorial page writers covered Art. VI salaries
Washington Post	Editorial writers covered Art. II minimum salaries
Washington News-Star	Editorial writers covered Art. I salaries (separate minimum)
Waterbury Republican & American	Editorial page editor exempt. Editorial writer covered Art. VII wages

EDITORIAL WRITERS INCLUDED

(Only Editorial Page Editors excluded)

Akron Beacon Journal	Editorial page editor exempt
Bakersfield Californian	Editorial page editor exempt
Gary Post-Tribune	Editorial page editor exempt
Haverhill Gazette	Editorial page editor exempt
Honolulu Advertiser	Editorial page editor exempt
Indianapolis Star & News	Editor of editorial page exempt
Long Beach Independent	Editorial page editor exempt
Minneapolis Star & Tribune	Editorial page editor exempt
Peoria Journal Star	Editorial page editors (2) exempt
Sacramento Union	Editorial page editor exempt
St. Louis Post-Dispatch	Editor of editorial page, asst. editor of editorial page exempt
Waukegan News-Sun	Editor of editorial page exempt

EDITORIAL WRITERS INCLUDED
(Only Chief Editorial Writer excluded)

CONTRACT	LANGUAGE
Albany Knickerbocker News-Union Star & Times Union	Chief editorial writer Times-Union exempt, Chief editorial writer Knickerbocker News exempt
Denver Rocky Mt. News	Chief editorial writer exempt
Lansing State Journal	Chief editorial writer exempt
New Brunswick Home News	Chief editorial writer exempt
Newburgh-Beacon News	Chief editorial writer exempt

EDITORIAL WRITERS INCLUDED
(By implication)

Alexandria Gazette	Silent on being excluded
Allentown Call & Chronicle	Silent on being excluded
Bridgeport Connecticut Sunday Herald	Silent on being excluded
Bridgewater Courier-News	Silent on being excluded
Brockton Enterprise & Times	Silent on being excluded
Chester: Delaware Co. Times	Silent on being excluded
Columbus Citizen Journal	Silent on being excluded
Coos Bay World	Silent on being excluded
Duluth Herald & News Tribune	Silent on being excluded
East St. Louis: Metro East Journal	Silent on being excluded
Eugene Register Guard	Silent on being excluded
Great Falls Tribune	Reporters, deskmen, photographers, all employees whose major duties are reporting, writing or editing of news or feature material. Contract covers these.

CONTRACT	LANGUAGE
Harrisburg Patriot & News	Silent on being excluded
Hazelton Standard-Speaker	Silent on being excluded
Hilo Hawaii Tribune-Herald	Silent on being excluded
Honolulu Star-Bulletin	Reporters, deskmen, copy readers, rewrite men, sports writers, society writers, photographers and other who contribute to the editorial content of the Honolulu Star-Bulletin who are not otherwise classified.
Huntington Park Signal	Editorial employees—Art. V wage minimums
Joliet Herald-News	Silent on being excluded
Kenosha News	Silent on being excluded
Kingston Daily Freeman	Silent on being excluded
Knoxville News-Sentinel	Journalist: Any employee who contributes to the editorial content of the paper, whether by producing or editing copy or art, including such employees as reporters, copy readers, makeup men; photographers, or any other so contributing.
Lexington Herald Leader	Silent on being excluded
Lowell Sun	Silent on being excluded
Lynn Item-Telegram News	Silent on being excluded
Madison Capital Times	Silent on being excluded
Malden News & Medford Mercury	Silent on being excluded
Massillon Evening Independent	Silent on being excluded
Memphis Commercial Appeal	Journalists: All employees who contribute directly to the editorial content of the paper, whether by producing or editing copy or art, including reporters, photographers, copyreaders, re-write men, special writers and editorial sub-executives.

CONTRACT	LANGUAGE
Monessen Valley Independent	Employees defined in NLRB case No. 6-RC-5132 dated 12/10/69
Mt. Clemens Macomb Daily	Silent on being excluded
New York Long Island Press	Silent on being excluded
Norfolk-Virginian-Pilot	Silent on being excluded
Pottstown Mercury	Silent on being excluded
Pueblo Star-Journal	Silent on being excluded
Richmond Independent	Silent on being excluded
Rockford Star & Register	Silent on being excluded
Sacramento Bee	Silent on being excluded
Salem, Mass. News	Silent on being excluded
Salem, Ore., Oregon Statesman Capital Journal	Silent on being excluded
San Jose Mercury	Silent on being excluded
San Juan El Imparcial	Silent on being excluded
San Juan Star	Silent on being excluded
San Mateo Times	Silent on being excluded
Santa Rosa Press Democrat	Reporters, deskmen, copy editors, rewrite men, society editor, society reporters, photographers, or other editorial department employees not otherwise classified in this agreement.
Scranton Times	Silent on being excluded
Seattle Post-Intelligencer	Silent on being excluded
Sheboygan Press	Silent on being excluded
Tacoma News-Tribune	Silent on being excluded
Terre Haute Tribune	Editorial department employees, which shall include all employees who contribute to the editorial content of the paper: Reporters, which include re-write men, sports editors, photographers, society editors and artists: (salary Art. VII).

CONTRACT	LANGUAGE
Tonawanda News	Silent on being excluded
Utica Press	Silent on being excluded
Vallejo Times-Herald	Silent on being excluded
Waltham News-Tribune	Silent on being excluded
Wayne Eagle	Silent on being excluded
Wilkes-Barre Sunday Independent	Silent on being excluded
Wilkes-Barre Times-Leader-News Record	Silent on being excluded
Woodbridge News Tribune	Silent on being excluded
Woonsocket Call	Silent on being excluded
Yakima Herald-Republic	Silent on being excluded
York Dispatch	Silent on being excluded
York Daily Record	Silent on being excluded

EDITORIAL WRITERS
(Specifically excluded)

Bay City Times	Editorial writer excluded (Art. III —Page 2)
Chattanooga Times	Editor and asst. editorial writers exempted (Page 3)
Chicago Sun-Times & Daily News	Editorial writers* exempted *Identified as editorial writers who regularly participate in editorial conferences where editorial policy is determined. (Art. II—Page 1).
Hammond Times	Editorial writer exempt (Page 1)
New York Daily News	Editorial writers exempt (Page 49)
New York Post	Editor of editorial page, Editorial writer exempt (Page 6)

CONTRACT	LANGUAGE
Pawtucket Times	Editorial writers exempt (Page 1)
San Diego Union & Tribune	Editorial writers-cartoonists exempt (Page 3)
Sioux City Journal	Editorial writers exempt (Page 1)
Youngstown Vindicator	Full-time editorial writers exempt (Page 3)

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-701 and 73-708

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.,
Respondents.

THE NEWSPAPER GUILD
Petitioner,

vs.

WICHITA EAGLE & BEACON PUBLISHING CO., INC.,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-701 and 73-708

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.,
Respondents.

THE NEWSPAPER GUILD,
Petitioner,

vs.

WICHITA EAGLE & BEACON PUBLISHING CO., INC.,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Petitions, App. A) is reported at 480 F.2d 52. The Decision and Order of the National Labor Relations Board (Board Pet., App. C) is reported at 199 N.L.R.B. No. 50.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted the National Labor Relations Act as not conferring jurisdiction upon the National Labor Relations Board over newspaper editorial writers who intimately participate in the formulation and expression of the position of the newspaper's management and owners regarding all issues deemed to be of public importance.

2. Whether the order of the Board directing the respondent newspaper to transfer one of its news department employees to her former position as an editorial writer, is supported by substantial evidence on the record considered as a whole.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the United States Constitution are as follows:

Article I, Section VIII:

> "The Congress shall have power . . . to regulate commerce. . . ."

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . ."

Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The pertinent provisions of the National Labor Relations Act (29 U.S.C. Sec. 151, *et seq.*) are as follows:

Section 1:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce. . . ."

Section 2:

> "(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication. . . ."

Section 8(c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if

such expression contains no threat of reprisal or force or promise of benefit."

Section 10(a):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce."

STATEMENT

Respondent publishes a newspaper in Wichita, Kansas. Appearing daily on the editorial page of respondent's paper are a few paragraphs which state the views and opinions of the management and owners of the paper on topics of current public interest. (A. 24-5)[1] During the time period material, five persons were involved in the process of initiating, discussing and writing the paper's editorials. These five were the publisher, the president (who was also one of respondent's owners), and three writers, one of whom, Charles Pearson, was the editor of the editorial page. The other two writers were Dorothy Wood and Ted Blankenship. (A. 214-17)

Although the editorial staff members were included in respondent's news department, and while such departments are, in the newspaper industry, also commonly referred to as the editorial department, or as the news and editorial department, the offices of the three editorial writers were located next to the president's office, separated by considerable distance from the newsroom and from the employees actually engaged in the gathering and reporting of news. (A. 20-21, 95, 222) The editorial writers would normally meet daily with the publisher for formal

1. "A." refers to the printed Appendix prepared for the Court of Appeals.

editorial conferences and, due to the proximity of their offices, would usually informally carry on discussions throughout the day with one another and with the president, concerning editorial content. (A. 26, 154, 181, 185, 218, 221-22)

During these conferences and discussions, any of the participants might suggest topics for consideration. A free exchange of ideas and viewpoints would take place, with each participant arguing for his subjective viewpoint as the appropriate one to be printed as the opinion of the paper's management and owners. (A. 95-96, 220) Unless both were absent, the editorial drafts were subject to revision or rejection by Pearson and the publisher. (A. 29)

Petitioner, the Newspaper Guild, organized respondent's news department during the spring and summer of 1970. (A.215) At the representation hearing before the regional director and also before the Board, petitioner objected to the inclusion of its editorial writers in the bargaining unit and to the jurisdiction of the Board over them. (A. 183-193) Pearson was excluded as a supervisor, but Wood and Blankenship were included in the unit over petitioner's objections that its freedoms under the First, Fourth, Fifth and Ninth Amendments would be infringed by the Board's assumption of jurisdiction over its editorial staff and that editorial writers have the characteristics of managerial or confidential employees. (A. 182, 183-93)

In January of 1971 the Wichita local of the Newspaper Guild was certified as the bargaining agent for the newsroom employees and for the two editorial writers. Shortly thereafter, Wood was elected as an officer of the union and as a member of its negotiating team. The publisher then denied Wood further permission to write editorials on labor-management issues. (A. 230-32) In August of 1971, Wood was elected to leadership of the Women's Politi-

cal Caucus, and invited the communications media to a charter meeting. On that occasion, she was identified on television and in the press as one of respondent's editorial writers. (A. 49-51, 236-37) The publisher then transferred her to a position in the newsroom with the same rate of pay, giving as the reasons for the transfer her diminished usefulness to the paper as an editorial writer, attributable to her public identification as a union official and as head of the Women's Political Caucus. (A. 239-40)

An unfair labor practice charge was filed with the Board on Wood's behalf. Following the hearing thereon, the trial examiner found that the publisher's claim that Wood's usefulness as an editorial writer had been diminished was a mere pretext, and that union animus was the underlying motive for her transfer. (A. 246) He reached this conclusion largely on the basis of the constitutional objections lodged by respondent in its brief in the representation proceeding and renewed at the unfair labor practice hearing, upon his interrogation and that of Board counsel regarding the paper's editorial policies and practices, upon testimony concerning the political leanings of the paper and the organizations to which its management belonged, and upon an analysis of certain of respondent's editorials measured by the trial examiner's standards for editorial writing. (A. 69-70, 102, 110-111, 121, 244, 234-36, 247-48) He recommended Wood's reinstatement as one of respondent's editorial writers. (A. 250-51) Respondent filed its exceptions thereto. The Board adopted, without comment, the trial examiner's recommended decision and order. (A. 255-60)

Upon respondent's petition for review and the Board's petition for enforcement of the order, the Court of Appeals for the Tenth Circuit refused to enforce the Board's order, holding that Wood was a managerial employee, that to

conclude otherwise would infringe respondent's constitutional freedoms, and that the order was without supporting substantial evidence on the record considered as a whole. (Board Pet., App. A) Thereafter, the Newspaper Guild was permitted to intervene, and both it and the Board filed with this Court their petitions for a writ of certiorari.

ARGUMENT

I

The Circuit Court's Holding That the Board Had No Jurisdiction Over Respondent Paper's Editorial Staff Is Clearly Correct, Does Not Conflict with Decisions of This Court or of Other Courts, and Presents No Important Question of Law Meriting Review.

The Court below was faced with a record burdened with violations of fundamental rights protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution, all of which violations resulted from the Board's assumption of jurisdiction over the paper's editorial staff and its investigation of the motive prompting Wood's transfer. By intruding directly upon the paper's editorial conferences and standards, and by probing into the thoughts, beliefs, attitudes and affiliations of its owners and management, the Board ignored the clear pronouncements of this Court as to:

Freedom of association and privacy in association. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449;

Forced disclosure of authorship of protected publications. *Talley* v. *California,* 362 U.S. 60;

The limits upon governmental regulations for public convenience when such regulations conflict with First Amendment rights. *Schneider* v. *Irvington,* 308 U.S. 147;

The Constitutional strictures against governmental activity which amounts to a prior restraint upon the press or a deterrent of speech or of the written word, which the Constitution makes free. *Near* v. *Minnesota,* 283 U.S. 697; *New York Times Co.* v. *Sul-*

livan, 376 U.S. 254; *Speiser* v. *Mandall*, 357 U.S. 513; *New York Times Co.* v. *United States*, 403 U.S. 713

The reinstatement of Wood to the paper's editorial staff would not only entail a continuing infringement of each of the foregoing protected activities, it would also require constant governmental surveillance of the paper's editorial processes in order to insure that Wood was included in all editorial conferences and that she was not discriminated against in the granting of editorial topics or in the editing of her submissions. Governmental policing of newspaper editorial conferences, of editorial assignments and of editorial composition is as clearly outlawed by the First Amendment as is government surveillance of religious affairs. *Lemon* v. *Kurtzman*, 403 U.S. 602.

Throughout the proceedings below, and in its petition to the Court, the Board has maintained steadfast silence as to the constitutional problems created by its assumption of jurisdiction over the paper's editorial processes and staff. The Guild, in its petition, maintains that this Court placed its stamp of approval upon the Board's conduct here by the decision in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, a representation proceeding in which the employer, a major news wire service, made no substantive record. Notwithstanding the surface confusion created by newspaper terminology, which sanctions the designation of newspaper copywriters as editorial employees, the facts in *Associated Press* have nothing to do with employees intimately and directly involved in the formulation and composition of newspaper editorial policies, as the Court below readily perceived.

> "*Associated Press* dealt not with a person who was actively engaged in the 'formulating, determining and effectuating' of the employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37 (7th Cir.); *Retail Clerks International Ass'n, AFL-*

CIO v. *NLRB*, 366 F.2d 642 (D.C. Cir.). Rather, that case dealt with a person who, although characterized as an 'editor' or 'editorial employee,' was employed '. . . to determine the news value of items received and speedily and accurately to rewrite the copy delivered to [him], so that the rewritten matter [should] be delivered to the various filing editors. . . responsible for its transmission, if appropriate, to the areas reached by their circuits.'

"Regardless of which appellation is given to the employee in *Associated Press*, whether it be 'editor,' 'editorial employee,' or a member of the 'news department,' his position was much more akin to that of the employees in the news department of the petitioning Wichita Eagle & Beacon Publishing Co., Inc., in the instant case than to that of Mrs. Wood. The hierarchy of personnel in Associated Press was such that the aggrieved employee was responsible, in turn, to a filing editor, various 'editorial employees,' 'supervising editors,' and an 'executive news editor' in the 'news department' of the Associated Press." (Board Pet., App. A, pp. 12-13)

There is no decision of this Court or any court which sanctions governmental regulation of a newspaper's editorial staff or investigation of its editorial policies and practices. As was its clear duty, *United States* v. *Rumely*, 345 U.S. 41, the Circuit Court construed the act so as to save it from such obvious constitutional infringement.

"To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper's management would come perilously close to infringing upon the newspaper's First Amendment guarantee of freedom of the press." (Board Pet., App. A, p. 14)

Surely, neither petitioner can sincerely expect this Court to overturn the holding below that an order compelling participation in a newspaper's editorial conferences and related editorial processes does ". . . infringe upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas." (Board Pet., App. A, p. 14) Alternatively, the decision of the Circuit Court is clearly supportable on the ground that editorials of a newspaper are strictly non-commercial in nature, and are not commerce within the meaning of Article I, Section VIII of the Constitution, nor commerce within the grant of power to the Board over labor disputes affecting commerce. *See, Pittsburgh Press Co.* v. *Pittsburgh Human Relations Comm.*, ... U.S. ....., 37 L.Ed. 2d 669.

The decision below does not rest upon the distinction between the Board's rule-making and adjudicatory processes when determining the proper definition of managerial employees, as in *Bell Aerospace Company Division of Tepton Inc.* v. *N.L.R.B.*, 2 Cir., 475 F.2d 485 (1973), cert. granted October 9, 1973, No. 72-1593. In view of the far more substantial constitutional considerations compelling the result below in the instant proceedings, the petition here should be promptly denied, regardless of the Court's disposition of the Bell case.

II

The Circuit Court's Determination That the Order of the Board Was Not Supported by Substantial Evidence Was Clearly Correct and Was Not a Departure from the Course of Accepted and Usual Judicial Proceedings.

The evidentiary foundation for the Board's order was provided by the illicit investigation conducted by the trial examiner and counsel for the Board concerning the paper's

editorial processes, editorial content, and editorial standards, as well as upon disclosures obtained concerning the organizational affiliations of its management, as aforesaid. In addition, the views expressed in the brief on behalf of the paper in the representation proceedings, and its legal position taken in the unfair labor practice proceedings, were used as evidence against the paper, notwithstanding the clear prohibitions of Section 8(c) of the Act, and notwithstanding the plain language of the First Amendment and the due process requirement of the Fifth Amendment. All such evidence was admitted and considered in direct disregard of Congressional and constitutional prohibitions. *Smith* v. *California*, 361 U.S. 147; *Griffin* v. *California*, 380 U.S. 609. A record consisting of such evidence cannot possibly provide substantial support for any affirmative order made thereon. The ruling below that the Board's order was without substantial support on the record considered as a whole was clearly correct. Only a contrary ruling would have merited the attention of this Court.

CONCLUSION

For the foregoing reasons the petitions herein for a writ of certiorari should be denied and without deferral of this cause to the Court's decision in No. 72-1598, *National Labor Relations Board* v. *Bell Aerospace Company*, certiorari granted October 9, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing Brief of Respondent in Opposition to Petitions for a Writ of Certiorari on all parties separately represented herein and on the Solicitor General pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States by depositing the same in a United States mailbox with first class postage or airmail postage, prepaid, addressed to counsel of record at the following addresses:

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